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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1970

James E. Macdonald, Jr.,

Petitioner

- v -

No. 1692

The Shawnee Country Club, Inc., et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Robert W. Lett
106 West Main Street
Ashland, Ohio 44805

R. T. Boehm
Boehm & Rance
1200 West Fifth Avenue
Columbus, Ohio 43212

Counsel for Petitioner

John A. Robenalt
Robenalt, Daley, Balyeat & Balyeat
110-112 North Elizabeth Street
Lima, Ohio 45801

Counsel for Respondents

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ANALYSIS OF QUESTIONS PRESENTED FOR REVIEW

The seven questions Petitioner has presented for review raise but one issue.

The Petition for Certiorari seeks a review of Petitioner's expulsion from the Respondent Country Club.

Questions 2 through 5 add certain additional matter to the request for the review of Petitioner's expulsion from Respondent Country Club.

In question 2 it is the statement that the expulsion violated Petitioner's Civil Rights.

In question 3 it is the statement that the expulsion was conducted by the officers of a corporation organized under the laws of Ohio.

In question 4 it is the statement that at the time of expulsion the Respondent Corporation operated certain facilities and purchased goods and services in the operation of those facilities.

In question 5 it is the statement that at the time of expulsion Respondent Club was exempt from Federal Income Tax and Ohio Franchise Tax.

In question 6 the Petitioner seeks review of his expulsion by asking the Court to determine his standing to maintain the suit to review his expulsion.

In question 7 the Petitioner presents a question which does not appear applicable to this action since no discrimination is alleged to Petitioner because of his race or religion.

THE ISSUE PRESENTED FOR REVIEW

The issue presented by the Petition for Certiorari is whether Petitioner's expulsion from the Respondent Club should be the subject of review for the purpose of settling important questions of Federal Law that have not been but should be settled by this Court.

STATEMENT OF CASE

The Petitioner's statement of this case omitted certain facts vital to the determination of this Petition. The Petitioner filed in the Supreme Court of the State of Ohio a quo warranto action seeking the appointment of a receiver for The Shawnee Country Club, State Ex Rel. Macdonald vs. The Shawnee Country Club, et al. 2 OS 2nd 325 207 NE2 658 (Supreme Court, Ohio, 1965).

After the filing of this action on December 14, 1964 by the Petitioner a meeting of the Board of Trustees of the Club was held on December 16, 1964 at which a motion to expel Petitioner was made for the reason that his actions had been noncompatible with the welfare, character and interest of the Club. Pursuant thereto a notice was issued to the Petitioner notifying him of a hearing which was to be held on January 4, 1965, for the purpose of permitting him to present any matters he might desire in connection with the motion which had been made to expel him. At the conclusion of the hearing on January 4, 1965, the Board of Trustees voted unanimously to expel the Petitioner from membership in Respondent Country Club.

RESPONDENT CLUB IS A PRIVATE CLUB

The Court of Appeals in its decision (set forth in Appendix B of the Petition at Page IV) found the Respondent Country Club to be a private club. The District Court, in its opinion, (set forth as Appendix C to the Petition at Page XII) found the Respondent Country Club to be a private club.

The Petition contains no allegation that the Club is in fact open to the public.

The statement of the case (Page eight of the Petition) makes reference to the Respondent Country Club catering to fifty thousand (50,000) people every year, "a significant proportion of whom are not Club members". This statement avoids alleging that the Respondent Country Club was open to the public and attempts, by insinuation, to create the impression that the Club was in fact open to the public. It should be noted that the statement at Page 8 of the Petition made in this regard is in no way inconsistent with the use of the Respondent Country Club by its own members and their guests.

The actual allegations of the Petition are that Respondent Country Club is a mem-

bership corporation (Page 8 of the Petition) and a private club (Page 10 of the Petition) having four hundred twenty-five (425) members (Page 8 of the Petition) membership in which cost the Petitioner Six Hundred Fifty Dollars ($650.00) (Page 11 of the Petition) and monthly dues (Page 6 of the Petition) and the Trustees of which exercised their authority to expel Petitioner (Pages 6 and 11 of the Petition) subsequently barring Petitioner from all rights and privileges of membership (Page 8 of the Petition).

This Court in Daniel vs. Paul, 395 US 30, 23L Ed 318, (1969), has by implication defined a private club. In that case Lake Nixon was found not to be a private club and the statement was made in the opinion at Page 301 that "It was simply a business operated for profit with none of the attributes of self government and member ownership traditionally associated with private clubs."

Respondents submit that the statements contained in the Petition show the self government and member ownership of Respondent Shawnee Country Club and support the holding of the District Court and the Court of Appeals.

PETITIONER'S RIGHT AS A MEMBER OF A PRIVATE CLUB

Petitioner is entitled to notice of and hearing on the charges brought against him in accordance with the rules of Respondent Country Club and to a proceeding in good faith in accordance with the laws of the land. State Ex Rel. Ohio High School Athletic Association et al. v. Judges of the Court of Common Pleas of Stark County, 173 OS 239, 19 002 52, 181 NE2 261, as followed Lough et al. v. Varsity Bowl, Inc. et al. 16 OS2 153, 45 002 483, 243 NE2 61. Also see Cheny v. Ketcham 50NP 139, 7-OD-183 as quoted in 20 ALR2 344, et seq., Bouldin v. Alexander (US) 15 Wall 131, 21 L ed 69; Watson v. Jones (US) 13 Wall 679, 20 L ed 666; Robinson v. Templar Lodge, I.O.O.F. 117 Cal 370, 49 P 170; Otto v. Journeyman Tailors' Protective & Benev. Union, 75 Cal 308, 17 P 217; Connelly v. Masonic Mut. Ben. Assoc. 58 Conn 552, 20 A 671; Green v. Board of Trade, 174 Ill 585, 51 NE 599; Reno Lodge I.O.O.F. v. Grand Lodge, I.O.O.F. 54 Kan 73, 37 P 1003; Irwin v. Lorio, 169 La 1090, 126 So 669; Eberts v. Congressional Country Club, Inc. 197 Md 461, 79 A2d 518; Hembeau v. Great Camp, K.M. 101 Mich 161, NW 417; Allen v.

Duffie, 43 Mich 1, 4 BW 427; Dewar v. Minneapolis Lodge, 155 Minn 98, 192 NW 358, 32 ALR 1012; Baltimore & O.R. Co. v. Stankard, 56 Ohio St 224, 46 NE 577; Com. ex rel. Burt v. Union League, 135 Pa 301, 19 A 1030; Society for Visitation of Sick v. Commonwealth, 52 Pa 125; Pepin v. Societe St. Jean Baptiste, 24 RI 550, 54 A 47.

The Petitioner's expulsion from a private club is not a matter for Federal jurisdiction and a complaint based thereon cannot state a claim upon which relief can be granted in the absence of a violation of a Constitutional right or of Federal Law.

The Petition makes no claim that Petitioner did not receive notice of charges and hearing or that a hearing for him to present facts in connection with his expulsion was not held or that the Club's action of expulsion was not based on an adopted by-law which was followed by the Board of Respondent Club (See Appendix A attached to this Brief for allegations of the original complaint).

Thus Petitioner attempts to present in his complaint the denial of his right to free speech and overlooks the rights of all other club members to have their club remain in existence.

The reason advanced in the Petition for the invalidity of the expulsion is that his right to "speak freely to advocate changes of policy" (Page 12 of the Petition) was denied and that his "right to talk about a change" was denied (Page 10 of the Petition).

PETITIONER'S ARGUMENTS AS TO JURISDICTION

(Questions 1 through 5)

The Petitioner urges the granting of the Writ by alleging in questions 1 and 2 that the Petitioner's Civil Rights were violated. In light of the Petitioner's action in quo warranto in the Supreme Court of Ohio, seeking the dissolution of the Club of which he was then a member, the reason for expulsion becomes clear.

The due process accorded Petitioner as to procedural matters and the natural justice of the Respondent Club's action in response to his attempts to dissolve the Club would seem to negate any violation of the Civil Rights of Petitioner.

Question 3 attempts to equate the actions of officers of a corporation with the color of state law necessary to bring the matter within Title 42, Section 1983 USC and Title 42 Section 2000A-1 USC.

The argument advanced by Petitioner that incorporation of a private club, under Ohio Statutes providing for incorporation,

clothes the action of the officers and directors of the club with the color of law is not supported by any law, statutory or otherwise.

Question 4 attempts to bring the Respondent Club within the purview of Title 42, Section 2000 USC, et seq. But as a private club the Respondent Club is specifically exempted from the provision of this Act in Title 42, Section 2000 a (e) USC.

The argument in question 5 that the exemption from income tax granted a non-profit corporation is the equivalent of the Federal assistance referred to in Title 42, Section 2000 D USC (See Appendix B this Brief), is not supported by any law, statutory or otherwise, that counsel for Respondent Club is aware of.

PETITIONER'S STANDING

(Question Six)

This Court in Association of Data Processing Service Organizations, et al. v. William B. Camp, 38 LW4193, at Page 4194 said that standing concerns "whether the interest sought to be protected by the complaintant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Using that test, Petitioner's standing with regard to his ultimate complaint, that of his expulsion from membership in Respondent Country Club, would seem to fail.

PETITIONER'S SEVENTH QUESTION

We do not argue question seven as presented by the Petitioner. We feel that the District Court and the Court of Appeals have both herein amply supported the theory which we submit is correct, that these cases advanced by Petitioner do not apply to this Petition since Plaintiff has not been discriminated against by reason of his race or his religion.

APPLICATION OF THE PRINCIPLE OF RES JUDICATA

The Petition makes no mention of one important aspect of the case decided by the Trial Court. At Page VIII of Appendix C of the Petition the District Court found that the dismissal of the 1968 case precluded the Plaintiff's bringing of this suit under the doctrine of Res Judicata and it would seem that this issue alone would be dispositive of this case.

CONCLUSION

We submit that the Writ should be denied for the reason that Petitioner's expulsion from Respondent private club does not constitute in the first instance a claim upon which relief can be granted and upon the further ground that the application of the principle of res judicata precluded the bringing of this cause.

There being no important questions of Federal Law to be settled by this Court raised by the Petition in connection with Petitioner's expulsion from Respondent Club, the writ should be denied.

Respectfully submitted,

/s/ John A. Robenalt
John A. Robenalt of Robenalt,
Daley, Balyeat & Balyeat
110-112 North Elizabeth Street
Lima, Ohio 45801
Attorneys for Respondents

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

James E. Macdonald, Jr., for himself, and for all others similarly situated, Lima, Ohio

Plaintiffs

Case No. C69-135

-vs-

The Shawnee Country Club, Inc., et al.

Defendants

Complaint

The following are excerpts from the Complaint filed in Federal District Court.

. . .

4- Defendant, The Shawnee Country Club, Inc., is a corporation not for profit organized on May 25, 1904, and presently existing under the law of the State of Ohio. It is acting under corporate charter 17496 under the official action and authority of the Secretary of the State of Ohio; and as such The Shawnee Country Club, Inc. exercises corporate rights and power under the grants of authority made to it under Ohio Revised Code Chapter 1702, and other provisions of the law of Ohio.

. . .

5- The Shawnee Country Club, Inc., has about 500 members, many of whom are residents of Allen County, Ohio. The corporate power of the Club is exercised by a Board of Trustees, most of whom are named as defendants in this action.

. . .

8- One of the significant and valuable aspects of the plaintiff's membership in The Shawnee Country Club, Inc., is the right of the plaintiff, and his family, in common with all other members of the Club, to use the club house, swimming pool, tennis courts, golf course, putting green, pro shop, bar, bath house, restaurant, snack bar, locker room, parking lots, and various other facilities and equipment owned by the Club and made available to the members as an incident to their membership.

. . .

9- Previous to January 4, 1965, plaintiff's wife and children had made frequent use of their privileges as members of The Shawnee Country Club, Inc., but since the expulsion of the plaintiff, they have been deprived of the right to such use, to the further irreparable injury to the plaintiff in his property rights.

. . .

19- At all times during the calendar years 1964 and 1965 there was in effect as a rule or by-law of The Shawnee Country Club, Inc., the following Rule, Section 18, the only rule or standard dealing with the corporate power to suspend and expel a member:

> "Section 18. The Board of Govenors shall have the power to suspend from the privileges of the Club or to expel any member whose acts or conduct shall be found by a vote of the majority of the Board, to have been unbecoming to a lady or gentleman or to have been non-compatible with the welfare, character or interest of the Club but no member shall be suspended or expelled without at least ten days notice of the charges made against him or her, nor until he or she shall have had an opportunity to be heard."

. . .

21- On December 16, 1964, the individual defendants, acting through one William J. Wieging, caused to be served on the plaintiff a written notice which stated as follows:

"The Shawnee Country Club
Incorporated - 1904

"P. O. Box 1264 Lima, Ohio

December 16, 1964

"Mr. James E. Macdonald, Jr.
1821 Shawnee Road
Lima, Ohio

"Dear Mr. Macdonald:

"By direction of the Board of Governors of the Shawnee Country Club, Inc., I have beer instructed to notify you that a motion was made to expel you from membership in the Shawnee Country Club, Inc., pursuant to Section 18 of the By-Laws of said Club for the reason that your recent actions and conduct have been non-compatible with the welfare, character and interest of the Club. Said motion passed by a majority vote of the Board and the Board has set the 4th day of January, 1965, at 7:30 p.m. at the

. . .

Shawnee Country Club, Lima, Ohio, as the time and place for you to present any matter you may wish to in connection with your expulsion from said Club.

"THE SHAWNEE COUNTRY CLUB

"BY ORDERS OF THE BOARD OF GOVERNORS

/s/ William J. Wieging
William J. Wieging
Assistant Secretary

"WJW/bb."

. . .

23- From and after January 4, 1965, the defendants removed the plaintiff's name from the roll of the membership in The Shawnee Country Club, and have withdrawn from plaintiff, his wife and children, all rights and privileges of membership, the use of the physical facilities and the freedom to assemble and to associate at the Club house and grounds.

APPENDIX B

TITLE 42 SECTION 2000d-1

2000d. PROHIBITION AGAINST EXCLUSION FROM PARTICIPATION IN, DENIAL OF BENEFITS OF, AND DISCRIMINATION UNDER FEDERALLY ASSISTED PROGRAMS ON GROUND OF RACE, COLOR, OR NATIONAL ORIGIN

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. Pub. L. 88-352, Title VI. Par. 601, July 2, 1964, 78 Stat. 252.